

## ATTACHMENT B

27. *For purposes of this question, assume a “deadlocked vote” is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of Matters Under Review considered in Executive Session since January 1, 2012 and that are now closed, how many and what percentage of the MURs included at least one deadlocked vote of the Commission during Executive Session? Please provide, categorized by year since 2012, the count and percentages. Please also provide the MUR number for each MUR that included at least one deadlocked vote.*

### Response of

#### Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter

Using a Commission vote database maintained by the Commission’s Secretary, an Enforcement Division case management database, and the Enforcement Query System on the FEC’s website, all MURs (as defined in response to question 25 above) that were considered by the Commission in Executive Session after January 1, 2012 and that were closed as of April 1, 2019 were examined. 531 such MURs were identified. 269 of these MURs, or 50.6%, had at least one vote after January 1, 2012, with no position receiving the support of four or more Commissioners, which the Commission has typically called a “split vote.” Split votes are most often 3-3 or 2-2, and can also be any other combination that lacks four or more votes in the affirmative or negative.

The Commission does not consider some of the votes that the question considers to be “deadlocked” to be split votes. FECA requires four Commissioners’ votes for certain decisions, without regard to how many Commissioners are currently serving. Consequently, the Commission views any position supported by four or more Commissioners as a Commission decision, and not as a “deadlocked” vote.<sup>1</sup> The question seeks information about cases where there were not four *affirmative* votes. In one such case, for example, an initial motion to dismiss the case as a matter of prosecutorial discretion was defeated by a vote 1-5, and the case then proceeded through multiple unanimous votes through reason-to-believe and probable-cause-to-believe findings, and was resolved by a conciliation agreement with admissions and a substantial civil penalty.<sup>2</sup> The initial vote of 1-5 lacks four affirmative votes and is therefore responsive to this question. The Commission, however, would not consider this case an example of a “deadlocked” case. As a result of conferring with House Administration Committee staff, the Commission compiled the data related to cases with votes like this and present it separately in footnotes in response to questions 27 and 28.<sup>3</sup>

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<sup>1</sup> Congressional Research Service did not consider four or more negative votes to be a deadlocked vote in its work in 2009 or 2015. See CRS, “The Federal Election Commission: Enforcement Process and Selected Issues for Congress,” R44319, at 10 n.44 (Dec. 22, 2015) and CRS, “Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress,” R40779, at 5 & 10-11 (Oct. 6, 2009).

<sup>2</sup> See MUR 6394 (Pingree for Congress).

<sup>3</sup> If additional cases with votes that lack four affirmative votes after January 1, 2012, are also considered responsive to question 27, an additional 12 MURs would be responsive, for a total of 281 or 52.9%.

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The following chart breaks down this data by calendar year. Some MURs are subject to one vote in one Executive Session, while others can be considered in multiple Executive Sessions that might fall in different years. The data below include each MUR considered by the Commission in Executive Session in each of the calendar years, so some MURs appear more than once.

<b>Calendar Year</b>	<b>Closed MURs with At Least One Split Vote Considered in Executive Session</b>	<b>Closed MURs Considered in Executive Session</b>	<b>Percentage (At Least One Split/ Closed MURs in Exec.)</b>	<b>Total Closed MURs (Exec. Sess. &amp; Tally)</b>	<b>Percentage (At Least One Split/ Total Closed MURs)</b>
2012	27	61	44.3 %	103	26.2 %
2013 <sup>4</sup>	41	93	44.1 %	172	23.8 %
2014 <sup>5</sup>	23	61	44.3 %	94	24.5 %
2015 <sup>6</sup>	53	91	58.2 %	133	39.8 %
2016 <sup>7</sup>	49	75	65.3 %	137	35.8 %
2017 <sup>8</sup>	39	72	54.2 %	169	23.1 %
2018	51	86	59.3 %	194	26.3 %
1/1-3/31/2019	16	20	80.0 %	35	45.7 %
Total for Entire Period	269	531	50.6 %	839	32.1 %

In addition to the 531 cases resolved in Executive Session, the Commission resolved a significant tranche of cases unanimously without the need for an Executive Session. As noted in response to Question 26, an additional 308 MURs were resolved on tally, for a total of 839 closed MURs.<sup>9</sup> Thus, MURs resolved on tally are nearly 37% of the closed MURs for this eight year period, which is far too large a portion to ignore. In order to provide more complete information, the chart above also presents the closed MURs with at least one split vote as a

<sup>4</sup> If votes lacking four affirmative votes were included, 2013's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by one to 42, and the percentage would increase to 45.2 %.

<sup>5</sup> If votes lacking four affirmative votes were included, 2014's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by two to 25, and the percentage would increase to 41.0%.

<sup>6</sup> If votes lacking four affirmative votes were included, 2015's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by seven to 60, and the percentage would increase to 65.9 %.

<sup>7</sup> If votes lacking four affirmative votes were included, 2016's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by three to 52, and the percentage would increase to 69.3 %.

<sup>8</sup> If votes lacking four affirmative votes were included, 2017's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by four to 43, and the percentage would increase to 59.7%.

<sup>9</sup> By definition, all 308 MURs resolved on a tally vote were cases where the Office of General Counsel's recommendations received at least four Commissioners' votes—and in fact unanimous Commissioner support in very nearly all such cases.

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percentage of total closed MURs each year, including all the MURs closed exclusively on tally vote and those considered in Executive Session.<sup>10</sup>

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<sup>10</sup> Results from other analyses of Commissioner voting data vary widely based on methodology, time period, and the types of votes studied. For example, in 2009 the Congressional Research Service (CRS) defined “substantive deadlocks” as votes garnering less than four Commissioners’ support and which “essentially halted substantive Commission action.” See R. Sam Garrett, Cong. Research Serv., R40779, Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress at 4-5 (Aug. 26, 2009) (finding “substantive deadlocks” occurred in approximately 13% of publicly available MURs closed between July 2008 and June 2009).

In 2013, Public Citizen defined deadlock as *any* split vote on *any* Commission enforcement vote, regardless of whether it ended substantive Commission action. See Public Citizen, Roiled in Partisan Deadlock, Federal Election Commission Failing (Apr. 2015) (finding an average of 18.8% of all substantive and non-substantive *votes* were split between 2012-2014, but an average of 4.8% from 2003-2014). In 2015, the CRS noted the debate over how to count deadlocks, noting that “[f]ocusing on deadlocks might or might not provide meaningful information” since they “reveal little about why the Commission made its decision (or declined to make a decision).” One method counts MURs as the “‘unit of analysis’ (the thing being counted)” where votes precluding resolution of the matter would count as a single deadlock (*i.e.*, CRS’s definition of “substantive deadlock” in 2009). By contrast, a higher number results when each individual split vote is defined as a Commission deadlock. See R. Sam Garrett, Cong. Research Serv., R44318, The Federal Election Commission: Enforcement Process and Selected Issues for Congress at 13 (Dec. 22, 2015).

Before her departure in 2017, former Commissioner Ravel utilized the same metric as Public Citizen (*any* split vote on *any* Commission enforcement vote) to proclaim the Commission was suffering from an “enforcement crisis,” but even under this analysis, the percent of MURs “closed due to a deadlock” never exceeded 15% and averaged less than 10% for all MURs between 2006 and 2016. See Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp at 10 (Feb. 2017). As shown in our response to the Committee’s question number 28, an average of **just 10.0%** of MURs closed because of Commission deadlocks from January 1, 2012 through March 31, 2019.

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28. *For purposes of this question, assume a “deadlocked vote” is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of Matters Under Review considered in Executive Session since January 1, 2012 and that are now closed, how many and what percentage of the MURs deadlocked on all votes taken during Executive Session, other than a vote to close the file and send the appropriate letter(s)? Please provide, categorized by year since 2012, the count and percentages. Please also provide the MUR numbers and MUR subject of the cases that deadlocked on all votes taken in Executive Session (other than a vote to close the file and send the appropriate letter(s)).*

Of the 531 MURs that were considered by the Commission in Executive Session after January 1, 2012 and that were closed as of April 1, 2019, 84 of these MURs or 15.8% had split votes (as defined in response to question 27) on all votes taken during the Executive Session other than a vote to close the file.<sup>11</sup>

<b>Calendar Year</b>	<b>Closed MURs with All Split Votes Considered in Executive Session</b>	<b>Total Closed MURs Considered in Executive Session</b>	<b>Percentage (All Split/ Closed MURs in Exec.)</b>	<b>Total Closed MURs (Exec. &amp; Tally)</b>	<b>Percentage (All Split/ Total Closed MURs)</b>
2012	2	61	3.3 %	103	1.9 %
2013	12	93	12.9 %	172	7.0 %
2014	6	61	9.8 %	94	6.4 %
2015 <sup>12</sup>	19	91	20.9 %	133	14.3 %
2016 <sup>13</sup>	12	75	16.1 %	137	8.8 %
2017	12	72	16.7 %	169	7.1 %
2018	24	86	27.9 %	194	12.4 %
1/1-3/31/ 2019	11	20	55.0 %	35	31.4 %
Total for Entire Period	84	531	15.8 %	839	10.0 %

The MURs responsive to question 28 consist of matters where the votes on all substantive issues were split votes, other than votes to close the files. These 84 “all split” MURs were also responsive to question 27, as MURs with at least one split vote. However, an additional 185

<sup>11</sup> If all of the 839 MURs that have been closed from January 1, 2012, to April 1, 2019, are considered, and if additional cases with votes without four affirmative votes after January 1, 2012 are also considered, an additional 5 MURs would be responsive to question 28, for a total of 90 or 17.0%.

<sup>12</sup> If votes lacking four affirmative votes were included, 2015’s Closed MURs with All Deadlock Votes Considered in Executive Session would increase by three to 21, and the percentage would increase to 23.1%.

<sup>13</sup> If votes lacking four affirmative votes were included, 2016’s Closed MURs with All Deadlock Votes Considered in Executive Session would increase by two to 14, and the percentage would increase to 18.7%.

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MURs were also responsive to question 27. Unlike the 84 “all split” MURs, the other 185 MURs that were also responsive to question 27 had some degree of Commission consensus about the issues in those cases.

For example, some of the split votes that rendered a MUR responsive to question 27 concerned the terms of a conciliation agreement to resolve a MUR nearing its conclusion. The stage of the case alone means there was: (1) a four-vote consensus (at a minimum) about a reason-to-believe finding; (2) a similar consensus about a legal theory for that violation with a common understanding of the facts of a case; and (3) a similar consensus about whether an investigation was required, and if it was, about the state of the evidence of that case. Further, the Commission agreed that resolving the case by a conciliation agreement was the best next step, but then disagreed initially over the terms of a conciliation agreement that the Commission should seek from respondents to resolve the case. Of the 183 MURs that had at least one split vote but were not “all split” MURs, the Commission has identified more than fifty closed MURs where the split vote concerned the amount of a civil penalty in cases that went on to be resolved with at least four Commissioners’ votes with conciliation agreements with lower civil penalties.<sup>14</sup>

Similarly, some of the split votes that rendered a MUR responsive to question 27 concerned a particular aspect in a case that was otherwise handled by an at least four vote consensus of Commissioners. For example, in dismissing cases pursuant to the recommendation of the General Counsel and with the votes of at least four Commissioners, the Commission has had split votes over whether a respondent should be issued a letter of caution against repeating the conduct at issue in the MUR.<sup>15</sup> In other MURs, the Commission has had split votes over approving a proposed Factual and Legal Analysis that were followed by majority votes to approve a revised Factual and Legal Analysis.<sup>16</sup> The Commission has also had split votes concerning the amount in violation where, for example, the Commission pursued a case of a personal use violation of FECA, but disagrees over some of the transactions that were alleged personal use violations.<sup>17</sup> Like the disagreements over civil penalty amounts, these split votes show Commissioner disagreement on a particular aspect, but still within the context of four or more Commissioners in agreement over strategy for a case.

Still other split votes occur on more significant issues, and represent more consequential disagreement among Commissioners, but still should be viewed in their context of Commissioner agreement on other aspects of a case. For example, the Commission has had split votes over whether there is sufficient proof to pursue a FECA violation as a “knowing and willful” violation, which has potential parallel criminal consequences, and then agreed to pursue the same violation on a non-knowing and willful basis.<sup>18</sup> The Commission has also had split votes on particular legal theories of liability for respondents, while ultimately agreeing to pursue

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<sup>14</sup> See, e.g., MUR 7470 (For Our Future), Certifications (Aug. 8, 2018 & Feb. 7, 2019).

<sup>15</sup> See, e.g., MUR 7023 (Kinzler) and MUR 6961 (Trump).

<sup>16</sup> See, e.g., MUR 6566 (Foley).

<sup>17</sup> See, e.g., MUR 6498 (Lynch).

<sup>18</sup> See, e.g., MUR 6498 (Lynch).

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other legal theories of liability related to the same facts of a MUR.<sup>19</sup> The Commission has also had split votes on whether to begin an investigation of a case, followed by at least four vote consensus to resolve a case via conciliation.<sup>20</sup> These are significant and consequential disagreements among Commissioners; nonetheless, they should be viewed in context of Commissioner agreement about other aspects of the cases.

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<sup>19</sup> See, e.g., MUR 7126 (Michigan Democratic Party).

<sup>20</sup> See, e.g., MUR 6535 (Restore Our Future).